No. 2291

United States
Circuit Court of Appeals
For the Ninth Circuit

THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole TRUSTEE, under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913,
Appellant,

vs.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, WILLIAM T. WALLACE as Receiver of Great Shoshone and Twin Falls Water Power Company, GUY I. TOWLE, and CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, Defendants, and L. M. PLUMMER and E. B. SCULL, executors of the Estate of L. L. McClelland, deceased, JAKE M. SHANK, and AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, interveners,
Appellee.

AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, intervener,
Appellant,

vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, and WILLIAM T. WALLACE, as Receiver of Great Shoshone and Twin Falls Water Power Company, Defendants, L. M. PLUMMER and E. B. SCULL, Executors of the Estate of L. L. McCLELLAND, deceased, and JAKE M. SHANK, Interveners, and the EQUITABLE TRUST COMPANY OF NEW YORK, as sole Trustee under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913.
Appellees.

Brief of Intervener, Jake M. Shank on Rehearing.

ALFRED A. FRASER,
Boise, Idaho.
Solicitor for Intervenor, Jake M. Shank.

SYMS-YORK CO., PRINTERS & BINDERS, BOISE

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From an examination of the briefs of the appellants and of their petitions for rehearing it appears there are three questions of law which are presented

and urged upon the attention of this court as a ground for the reversal of this cause:

1st. That the interveners being general creditors have no standing in court to contest the validity of the mortgage given to the Equitable Trust Company of New York as trustees;

2nd. That the interveners are not entitled to any priority over other general creditors in the distribution of what is known as the unsecured creditors' fund; and,

3rd. That the receiver in the court below on behalf of all general creditors made the same attack upon the validity of the trust deed or mortgage as did these interveners.

These three questions we will discuss in the order above named.

We concede the general rule to be that a general creditor must first reduce his claim to judgment and have an execution returned *nulla bona* before he is in a position to attack a transfer of his debtor's property. This rule, however, is not absolute and it has many exceptions. When such proceedings are impossible or would be vain and involve useless expense the law does not demand it.

In Case v. Beauregard, 101 U. S. 688; 25 L. Ed. 1004, the Supreme Court said:

> "It is no doubt generally true that a creditor's bill to subject his debtor's interests in property to the payment of the debt must show that all remedy at law had been exhausted. And generally, it must be averred that judgment has

been recovered for the debt; that execution has been issued, and that it has been returned *nulla bona*. The reason is that until such a showing is made, it does not appear, in most cases, that resort to a court of equity is necessary, or, in other words, that the creditor is remediless at law. In some cases, also, such an averment is necessary to show that the creditor has a lien upon the property he seeks to subject to the payment of his demand. The rule is a familiar one that a court of equity will not entertain a case for relief where the complainant has an adequate legal remedy. The complaining party must, therefore, show that he has done all that he could do at law to obtain his rights. But, after all, the judgment and fruitless execution are only evidence that his legal remedies have been exhausted, or that he is without a remedy at law. They are not the only possible means of proof. The necessity of resort to a court of equity may be made otherwise to appear. Accordingly the rule, though general, is not without many exceptions. Neither law nor equity required a meaningless form. '*Bona, sed impossibilia non cogit lex.*' It has been decided that where it appears by the bill that the debtor is insolvent, and that the issuing of an execution would be of no practical utility the issue of an execution is not a necessary prerequisite to equitable interference." (Citing authorities.)

In the case of Alder Goldman Commission Company et al, vs. Williams et al, 211 Fed. 531, the court said:

> "As to the second ground the courts have established several exceptions to the general rule. One of them is that when it is shown that it is impossible or impracticable to obtain a judgment, another if a judgment has been secured, there is no property which can be subjected to an execution. Still another exception is when the property has been fraudulently conveyed by the debtor, then the remedy at law is wholly inadequate, and a resort to equity may be had. Thus, it has been held that the issuance of an execution is not a necessary prerequisite to a creditor's bill when it appears that a debtor has no property which is subject to an execution at law and the issuance of the execution would be of no practical utility."
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> Sage v. Memphis & Little Rock R. R. Co., 125 U. S. 361; 8 Sup. Ct. 887, 31 L. Ed. 694;
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> Johnson v. Powers, 139 U. S. 156, 11 Sup. Ct. 525, 35 L. Ed. 112;
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> Talley v. Curtain, 54 Fed. 4, 4 C. C. A. 1771;
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> Schofield v. Ute Coal & Coke Co., 92 Fed. 269, 34 C. C. A. 334;
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> Iazarus Jewelry Co. v. Steinhardt, 112 Fed. 614, 50 C. C. A. 393.
>
> "As stated in Sage v. R. R. Co., *supra*, 'When the suing out of an execution would be an idle ceremony, causing useless expense and being of

no real benefit to the plaintiff, it is unnecessary.'

"The courts almost universally recognize the rule that where the recovery of a judgment at law is impracticable, it is not an indispensable requisite to a creditor's bill. Kennedy v. Creswell, 101 U. S. 641, 645, 25 L. Ed. 1075; Case v. Beauregard, 101 U. S. 688, 690, 25 L. Ed. 1004; Mellen v. Moline Iron Works, 131 U. S. 352, 9 Sup. Ct. 781, 33 L. Ed. 178; National Tube Works v. Ballou, 146 U. S. 517, 523, 13 Sup. Ct. 165, 36 L. Ed. 1070; Wyman v. Wallace, 201 U. S. 230, 26 Sup. Ct. 495, 50 L. Ed. 738; Hibernia Insurance Co. v. St. Louis & New Orleans Trans. Co. (C. C.) 10 Fed. 596; Consolidated Tank Line Co. v. Kansas City Varnish Co. (C. C.) 45 Fed. 7; Guaranty Title and Trust Co. v. Pearlman (D. C.) 144 Fed. 550."

Talley v. Curtain et al, 54 Fed. 43 (C. C. A.).

In Murray v. Sioux Alaska Mining Co., 239 Fed. 818, this court speaking by Mr. Justice Hunt, say:

"We believe plaintiff makes a showing for equitable relief. It is not denied that the mining company is wholly insolvent, or that the claim of Murray is not justly owing. Execution would be of no avail as against the mining company. On such cases it would seem not to be necessary for the creditor first to reduce his claim to a judgment. * * * Again in such a case equity will not require the question of the validity of the debt due by the mining com-

> pany to Smith to be tried out in an action at law, for it would be useless to go through such a form. Case v. Beauregard, 101 U. S. 688, 25 L. Ed. 1004; Wyman v. Wallace, 210 U. S. 230, 26 Sup. Ct. 495, 50 L. Ed. 739; Tompkins v. Calawa Mills (C. C.) 82 Fed. 780; Adler Goldman Commission Co. v. Williams (D. C.) 211 Fed. 530; Fraser v. Cole, 214 Fed. 566, 131 (C. C. A.) 102."

The case of Adler Goldman Commission Co. referred to above was affirmed in Williams v. Adler Goldman Commission Co. (C. C. A.) Eighth Circuit, 227 Fed. 374, 142 (C. C. A.) 70.

In this case the original complainant, Guy I. Towle, was a general creditor and filed his bill on behalf of all creditors asking for the appointment of a receiver and the winding up of the affairs of the corporation. The defendant, the judgment debtors, filed an answer admitting its insolvency and the allegations of the bill of complaint and joined the complainant in asking for the appointment of a receiver. The defendant in that case, the judgment debtors, waived the question that the complainant was a general creditor. It is too late now for an outside party to raise that question.

In the matter of Reisenberg, 208 U. S. 90, 28 Sup. Ct. 219, 52 L. Ed. 403, in the opinion of the court by Mr. Justice Peckham, it is said:

> "In the case in the circuit court the consent of the defendant to the appointment of receivers, without setting up the defense that the com-

plainants were not judgment creditors who had issued an execution which was returned unsatisfied in whole or in part, amounted to a waiver of that defense. Brown B. and Co. v. Lake Superior Iron Co., 134 U. S. 530, 33 L. Ed. 1021, 10 Sup. Ct. 604; Metz. v. Cook, 108 N. Y. 504; Horn v. Pere Marquette R. Co. 151 Fed. 626."

In Horn v. Pere Marquette R. Co., 151 Fed. 626, the court say:

"A most absurd result would ensue if when the corporation has submitted to the jurisdiction of the court, either as a court of equity or to the local jurisdiction a creditor could come in or when brought in, might reopen the matter of jurisdiction over the debtor corporation. If such objection is not waived once for all so as to close the question as to stockholders and creditors what number of creditors would conclude the rest? In Grand Trunk Ry. Co. v. Central Vermont Ry. Co. (C. C.) 85 Fed. 87, 'It was very logically ruled by Judge Wheeler that a mortgagee subsequently intervening and being made defendant could not demur to the bill because the complainant who filed the bill was not a judgment creditor, being bound by the waiver of that objection by the railroad company, which had answered and consented to the appointment of a receiver."

Also Pennsylvania Steel Co. v. N. Y. City Ry. 157 Fed. (C. C.) 440.

In Pennsylvania Steel Co. v. New York City Ry. Co., 157 Fed. 440 (C. C.), the court say:

> "The complainants, it is true did not have judgments for their respective claims with execution returned unsatisfied but since Hollis v. Brierfield Coal Co. 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113, it has always been understood by federal judges that in the opinion of the Supreme Court such prerequisites were solely for the benefit of the defendant and when waived by him became nonessential."

In Yaryan Naval Stores Co. v. B. Borchardt Co., 217 Fed. 758, the court say:

> "Where months after a creditor's bill has been filed and defendants have appeared and filed answer admitting the indebtedness to complainant and all equities set up in the bill and consented to appointment of receiver it is too late to urge that inasmuch as complainant's claim has not been reduced to judgment the suit should be dismissed because the complainant had an adequate remedy at law."

In Rasmussen v. McKay, 177 Fed. (C. C. A.) 141, on page 146, the court say:

> "Recording a mortgage of chattels left in the possession of the mortgagor is required 'as against the rights and interterest of any third person.' The term 'third person' is broad enough to include everybody outside of the immediate parties to the instrument and their privies. A simple con-

tract creditor who has not obtained a judgment is just as much a 'third person,' is just as much a stranger to the mortgage, as is the simple contract creditor who has obtained a judgment. Both have the right to enforce payment, if that can be done. The interests of both are prejudiced if the debtor's property is covered by a fraudulent transfer. If at the time of the fraudulent transfer one creditor has obtained a judgment and the other has not, the only difference is that one has proceeded farther than the other in the enforcement of his rights and the protection of his interests. And when it is said that a fraudulent transfer is void only as to judgment creditors the expression means no more than that a creditor cannot seize his debtor's property until he has obtained some process which authorizes the seizure. As stated in Skilton v. Codington, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885: 'The rule that a creditor must first recover a judgment is simply one of the procedure and does not affect the right. Therefore, where the recovery of a judgment becomes impracticable, it is not an indispensable requisite to enforcing the rights of the creditor."

"Our examination of the Illinois cases has led us to conclude that the Illinois courts have not decided, independently of procedure and having regard solely to rights, that simple contract creditors, irrespective of the progress they may have made in suing their debtor, are not

'third persons' within the meaning and intent of the recording statute. Indeed, we think that the case of Long v. Cockern goes quite a way towards holding that they are. But at all events we consider that the question is open, and that we are therefore at liberty to adopt the construction we believe to be sound and righteous. The petition to review and revise is dismissed."

In the case of Continental Trust Co. v. Toledo St. L. & K. C. R. Co. 82 Federal 642, was an action similar to the one at bar and Circuit Judge Taft in passing upon the right of the interveners to contest the validity of a mortgage says:

It is first said on behalf of the bondholders that the interveners should not be permitted to contest the validity of the bonds in this action, because since the consolidation the action on behalf of the creditors has become so absorbed in the foreclosure bill that the latter action dominates the whole proceeding, and that, as in a foreclosure bill a general creditor could not contest the validity or amount of the mortgage lien, the same rule must prevail here. No such effect can be given to an order of consolidation. So to hold would be, to construe the order into one dismissing the creditors' bill. Causes are consolidated only when they may proceed to judgment under one title without impeding or diminishing the remedial object and effect of the proceeding for each complainant. In a hearing on

a creditors' bill, any creditor making himself a party by presenting a claim may be heard to contest the claim of every other creditor seeking payment out of the estate of the debtor. 2 Daniell Ch. Prac. (6th Ed.) 1210, note 3; Shewen v. Vanderhorst 1 Russ. & M. 347; Owens v. Dickenson Craig & P. 48, 56; Woodgate v. Field, 2 Hare, 211, 213; Whitaker v. Wright Id. 310, 314; Field v. Titmuss, 1 Sim. (N. S.) 218, 223; Graves v. Wright, 2 Dru. & War. 77, 79; Woodyard v. Polsley, 14 W. Va. 211. I can see no reason why any creditor intervening in this action under the creditors' bill may not attack the claim of any other creditor seeking the benefit of that bill. The bondholders have made themselves parties to the creditors' bill by a committee of their number, and have set up their claims and lien. Why may not another creditor attack their claims? It is said that every creditor is bound by the concession of the bill that the bonds and mortgage are valid. Why should this be so? Undoubtedly an intervening creditor may not defeat the judgment claim of the complainant, upon which the bill is founded and the court obtains jurisdiction. Fuller v. Redman, 26 Beav. 614; Briggs v. Wilson, 5 De Gex M. & G. 12. But why should the collateral averments of the bill not necessary to the cause of action stated, or the relief prayed in the bill, concluded the intervening creditors? I can see no reason, and I am not disposed to recognize

> or enforce unnecessary estoppels in procedure which would only increase the necessity for additional litigation. It must be held, therefore, that the petitioners may attack, under the creditors' bill, the validity and extent of the mortgage lien. And those creditors who have expressly conceded the validity and extent of the bonds may have leave to amend their petition by striking out the concession."

The allowance of the claim in the receivership proceedings is a sufficient judgment upon which to support this action.

> Plume and Atwood Manuf. Co. v. Baldwin, 87 Fed. (C. C.) 185;
>
> Ruggles v. Cannedy, 127 Cal. 290, 53 Pac. 911, 59 Pac. 27;
>
> Roan v. Winn, 93 Mo. 503, 4 SW. 736.

The amount and justness of the claim of the intervener, Jake Shank, has never been questioned by any party to the action. The books of the judgment debtor admitted the correctness of this claim.

The order of the court allowing this claim is as follows:

> "Upon statement of receiver, William T. Wallace, that the above named claim appears upon the books of the Great Shoshone and Twin Falls Water Power Company as a valid and existing claim against said company and it further appearing that the said receiver knows of no reason why said claim should not be allowed." (Transcript, page 341.)

The court entered an order requiring all parties interested in the matter to file objections against the allowance of this claim on or before January 17, 1916, (T. p. 346). No objection has been filed as against the allowance of this claim.

We contend that being the only creditors who saw fit to attack the validity of this mortgage and who have borne the labor and expense of the trial and who by their efforts have provided the fund for the payment of creditors are entitled to a priority over all other creditors as to such fund. This rule is announced in 12 Cyc. 61, as follows:

> "The principle is well established that where a creditor by his superior diligence discovers and uncovers property which could not be seized on execution at law, and properly files a creditors' bill to subject such property of the debtor to the satisfaction of his judgment, he acquires a lien on such property and becomes entitled to the satisfaction of his judgment out of such property in preference to other creditors, even though other creditors have judgments obtained prior to the time when the complaining creditor obtained his; and to the fastening or preservation of such a lien no injunction or attachment or levy on the property is necessary."

The two leading cases in America on this question are the cases of Edmeston v. Lyde, 1 Paige Ch. Rep. 636, and McDermott et al. v. Strong, 4 John, Ch. R. 687.

In Edmeston case, the court say:

> "And on further examination it may seem unjust that the creditor who has sustained all the risk and expense of bringing his suit to a successful termination, should in the end be obliged to divide the avails thereof with those who have slept upon their rights, or who have intentionally kept back that they might profit by his exertions, when there could no longer be any risk in becoming parties to the suit."

And again:

> "If the creditor whose execution is first returned unsatisfied pursues the race of legal diligence, by the commencement of a suit here, he will obtain the reward of his vigilance; but if he abandons the pursuit, or lingers on the way, before he has obtained a specific lien, he has no right to complain if another creditor obtains a preference by superior vigilance."

And in the case of McDermott v. Strong, Chancellor Kent said:

> "Though it be the favorite policy of this court to distribute assets equally among creditors *pari passu*, yet, whenever a judicial preference has been established, by the superior legal diligence of any creditor, that preference is always preserved in the distribution of assets by this court."

The above two cases are cited with approval by the Supreme Court of the United States in the case

of Freedman's Saving & Trust Company v. Earle, 110 U. S. 710. In this case the court say:

> "It is to be noted, therefore, that the proceedings is one instituted by the judgment creditor for his own interest alone, unless he elects to file the bill also for others in a like situation, with whom he chooses to make common cause; and as no specific lien arises by virtue of the judgment and execution alone, the right to obtain satisfaction out of the specific property sought to be subjected to sale for that purpose dates from the filing of the bill. 'The creditor', says Chancellor Walworth, in Edmeston v. Lyde, 1 Paige Ch. 637-640, 'whose legal diligence has pursued the property into this court, is entitled to a preference as the reward of his vigilance;' and it would 'seem unjust that the creditor who has sustained all the risk and expense of bringing his suit to a successful termination should in the end be obliged to divide the avails thereof with those who have slept upon their rights, or who have intentionally kept back that they might profit by his exertions when there could no longer be any risk in becoming parties to the suit'. As his lien begins with the filing of the bill, it is subject to all existing incumbrances, but is superior to all of subsequent date."

And again, the court say:

> "The passage cited from the opinion in Day v.

Washburn, supra, speaks of the preference thus acquired by the execution creditor as a legal preference. It was distinctly held so to be by Chancellor Kent in McDermott v. Strong, 4 Johns Ch. 687. He there said: 'But this case stands on stronger ground than if it rested merely on the general jurisdiction of this court, upon residuary trust interest in chattels, for the plaintiffs come in the character of execution creditors, and have thereby acquired, by means of their executions at law, what this court regards as a legal preference or lien on the property so placed in trust;' and 'admitting that the plaintiffs had acquired by their executions at law, a legal preference to the assistance of this court (and none but execution creditors at law are entitled to that assistance), that preference ought not, in justice, to be taken away. Though it be the favorite policy of this court to distribute assets equally among creditors, *pari passu*, yet, whenever a judicial preference has been established by the superior legal diligence of any creditor, that preference is always preserved in the distribution of assets by this court.' The decision in that case was made, giving the priority to the execution creditors who filed the bill, when, otherwise, by virtue of an assignment by the debtor who was insolvent the proceeds of the equitable interest sought to be subjected would have been distributed ratably among all creditors."

In the case of Federal Insurance Co. v. Detroit Fire & Marine Company, Circuit Court of Appeals of the Sixth Circuit, 202 Fed. 648, on page 656, the court say:

> "No distinction is perceived between the principle that should be applied here and that which prevails in equitable proceedings brought to enforce judgments against interests of debtors that cannot be reached by ordinary legal process. If priority is sought in such proceedings, the suit must be limited to that object, and not in terms extended to all creditors of the same class or creditors generally. This principle is applied in a variety of cases. For instance, in George v. St. Louis Cable & W. Ry. Co. (C. C.) 44 Fed. 122, 123, the late Circuit Judge Thayer, when speaking upon rehearing of a proceeding by judgment creditors to subject property that could not be effectively reached by execution at law, said:
>
> " 'I have no doubt that the three complainants by whom the billing this case was filed might have secured a priority by filing the same for their own benefit; but they did not do so. By the very terms of the bill, they professed to be acting not only for themselves, but 'in behalf of all and singular, the other judgment creditors of the respondent.' The effect was to waive the advantage they might have obtained by moving in their own behalf. The result is that the suit, in contemplation of law, has from the beginning

been prosecuted by the original complainants in behalf of all judgment creditors who might elect to come in and take advantage of what had been done in their behalf.'

"The same principle was recognized by Justice Bradley in Johnson v. Waters, 111 U. S. 640, 674; 4 Sup. Ct. 619, 637 (28 L. Ed. 547), and by Justice Mathews in Freedman's Savings & Trust Co. v. Earle, 110 U. S. 719, 716; 4 Sup. Ct. 226, 229 (28 L. Ed. 301), where he states the rule thus:

" 'It is to be noted, therefore, that the proceedings is one instituted by the judgment creditor for his own interest alone unless he elects to file the bill also for others in a like situation, with whom he chooses to make common cause.' "

In Seymour v. McAvoy, 53 Pac. 946, the Supreme Court of California say:

"A judgment creditor, by filing a bill in equity to subject equitable assets to the payment of his judgment, acquires an equitable lien on such assets and a priority over any other creditor who has not already filed such a bill. Other judgment creditors who have not filed such a bill are therefore not necessary parties to the action, and their presence is not necessary for the protection of the defendants. The court therefore did not err in refusing to bring in as parties other judgment creditors who had not themselves commenced any such suit."

In Reis v. Ravens, 68 Ill. App. 53, the court say:

"It is a well established doctrine that a creditor who has by calling to his aid a court of equity and by the exercise of his superior diligence discovered and uncovered property which could not be discovered and seized upon execution at law is entitled to a preference over other creditors."

In Senter v. Williams et al., 32 SW. 490:

"Though it is a favorite policy of a court of equity to distribute assets equally among creditors *pari passu*, yet, whenever a judicial preference has been established by the superior legal diligence of any creditor, that preference is always preserved in the distribution of assets by the court. McDermott v. Strong, 4 Johns. Ch. 587. Here the appellee to whom the reward of diligence was granted filed their bill to set aside the assignment for fraud and succeeded. The appellants contented themselves with standing by and seeing the appellees carry on the contest at their own labor and expense. This seems to come within the maxim '*Vigilantibus non dormientibus jura subservient*'. The creditor who first files his bill obtains thereby a priority and is entitled to be first paid out of the proceeds of the assets if there are no valid prior liens. Clark v. Figgins, 31 W. Va. 157, 5 SE. 643, and cases there cited. Section 577 Beach. Mod. Eq. Prac. lays down the rule as follows:

"A creditor who delays asking to be admitted as a complainant until after the case has been finally heard should be admitted, unless his admission is by consent only on condition that those who have expended their labor and incurred the risk of trying the case be first paid. In the case of Smith v. Craft, 11 Biss. 340, 12 Fed. 856, Judge Gresham maintained, that 'after the announcement of the finding of the court in favor of the complainant attacking the fraudulent preference if other creditors come in and ask to be made parties to the suit as co-complainants this may be done, but their claims will be postponed in favor of the original complainants.' 'It is clear that creditors filing a bill to set aside a fraudulent conveyance acquire a specific lien and are entitled to priority over other creditors at large.' Wallace v. Treakle, 27 Grat. 457."

We particularly call the court's attention to the case of Clark v. Figgins, et al., 5 S. E. 643. The case was decided in the Supreme Court of Appeals of West Virginia. The facts in the case are very similar to the case at bar, and the court, after reviewing the authorities upon this question at length, say:

"In Rappleye v. Bank, 93 Ill. 402, Mr. Justice Sheldon said, in delivering the opinion of the court: 'Although appellants might have proceeded and have avoided the trust deed, and have subjected the estate thereby conveyed to

the satisfaction of his judgment, or have had the lots sold on execution, he did not choose to assume that burden or expense. Appellee then assumed the undertaking of avoiding the trust deed, and succeeding in affecting the removal of the incumbrance, encountering all the expense and labor thereof. It is through this proceeding of appellee that this estate conveyed by the trust deed has been secured for application to the satisfaction of these judgments. Appellant now comes forward to appropriate to himself all the benefit. It does not seem just, and we think, under the equitable doctrine which courts apply in analogous cases, and the decision in Lyons v. Robbins, 46 Ill. 279, appellee is fairly entitled to a preference, as a reward of its diligence.' Here the three firms to whom the reward of diligence was granted, filed their answers in the court below, and were the only defendants who did so, attacking the said trust deed for fraud. They were fought in this by the plaintiffs in that suit, who were seeking a preference by trying to show the deed was valid. The other defendants contented themselves by standing idly by and seeing these active defendants carry on the contest at their own labor and expense. When these answers were filed, *quo ad*, these defendants claimed the effect was the same as if they had filed a bill for the purpose of having said trust deed declared fraudulent, and they may be regarded in the nature

of cross-bills. At that time there were no prior liens on the property, as all the attachments were subsequently declared void. These three firms were beaten in the court below, and decreed to pay costs with Dager & Co., Maddux Bros., H. N. Baily, and Allemony, Bear & Co. Three of these parties were applied to by Ruffner Bros., Arnold Abney and Hurst, Purnell and Co. to join them in an appeal and declined. None of the others came forward to join in the appeal. These three firms alone applied for the appeal, which was granted, and the decree reversed, and trust deed set aside as fraudulent. It seems to us this cause, in all its circumstances, is within the maxim, '*vigilantibus, non dormientibus, jura subveniunt.*' There would be no reward to the vigilant if these parties were now compelled to step aside, and let those who fought them persistently all through the cause, in both courts, and those who stood by and did nothing, take the fruits of their labor and expense, or to be compelled to divide it with them."

"A creditor whose legal diligence has pursued property which cannot be reached at law into a court of chancery is entitled to a preference as the reward of his diligence."

Edmeston v. Lyde, 1 Paige, 637, 2 L. Ed. 781;
Corning v. White, 2 Paige, 567, 2 L. Ed. 1031;
McDermott v. Strong, 4 Johns. Ch. 687, 1 L. Ed. 1981;

Weed v. Pierce, 9 Cow. 722;
Claflin v. Lisso, 27 Fed. Rep. 420;
Roberts v. Albany & W. S. R. Co., 25 Barb. 662;
Storm v. Waddell, 2 Sandf. Ch. 494, 7 L. Ed. 675;
Pullis v. Robinson, 73 Mo. 201, 39 Am. Rep. 397;
First Nat. Bank v. Gage, 93 Ill. 172;
Logan v. Robbins, 46 Ill. 277.

We are somewhat surprised that counsel for the appellants in their brief on rehearing should claim that the receiver contested the validity of the mortgage or trust deed in the court below. We assert here without fear of contradiction that as a matter of fact the receiver did not by pleading or by argument in the trial of the court even suggest to the court that the mortgage or trust deed was void as to the personal property for the reasons advanced by these interveners or for any other reason or at all. An examination of the record in this case will conclusively prove this statement to be true.

At the date of the trial the receiver was in default for want of an answer and the court entered an order requiring the receiver to file an answer to the bill for foreclosure. On page 141 of the transcript we find the following:

> "The court then directed William T. Wallace as receiver of the Great Shoshone and Twin Falls Water Power Company, duly appointed

in Equity case number 509, pending in this court, to file his answer in this cause by 10 o'clock in the forenoon of Oct. 26th, 1915, and said receiver within such time filed his answer as directed."

The answer which the receiver filed admits the validity of the mortgages and that the lien of the same attaches to all property of the insolvent debtor, real, personal or mixed.

Paragraph four of the bill of complaint, among other things, alleges:

"In and by said deed of trust said Great Shoshone and Twin Falls Water Power Company in order to secure the due and punctual payment of the principal and interest of all the aforesaid bonds issued and at any time outstanding, granted, bargained, sold, alienated, remised, released, conveyed, confirmed, assigned, transferred and set over and unto said trust company of America and James D. O'Neil as trustees and their successor or successors in the trust therein created all of the various parcels, premises, properties, rights, etc., and all other property, real, personal and mixed said Great Shoshone and Twin Falls Water Power Company, whether then owned or thereafter acquired as enumerated or referred to in said deed of trust dated May 1st, 1910.

"TO HAVE AND TO HOLD, all and singular said plants, works and other property and

rights, etc., in fee simple forever, in trust nevertheless for the equal and pro rata benefit of all holders of said bonds and coupons."

(Trans. p. 10 and 11.)

This allegation of the bill of complaint is not denied by the receiver in the answer filed by him.

Again in paragraph Sixth of the bill of complaint and in paragraph Sixteenth of the same the complainant alleges that it has a lien upon all property of the judgment debtor, real, personal and mixed, in favor of the bondholders, and these allegations are not denied by the answer of the receiver. (Trans. p. 12 and 28.)

It was stipulated in this case that the value of the personal property which the trial court decided was not subject to the lien of the mortgage should for the purposes of this action be considered as of the value of $45,000. This amount was just about sufficient to cover the claims of the interveners. This stipulation was not signed by the receiver or his attorney. If the receiver in the trial court had also made the attack upon this mortgage on behalf of general or other creditors why was he not a necessary party to this stipulation? The fact is, that at the time this stipulation was signed by all other counsel it was not even suggested by any of the parties that the signature of the receiver was necessary to such a stipulation as it was not considered that he had any interest in the matter whatever. The only intimation in the record from which counsel now contend

that the receiver had attacked the validity of this mortgage is found in the language of the trial court in his opinion on page 181 of the transcript, within which he states:

> "By intervening creditors and by the receiver it is urged that as to the personal property which the instrument purports to cover, it is void."

This statement of the trial judge that the receiver urged that the instrument was void is in direct conflict with all other parts of the record. The trial judge at the time he wrote this opinion did not have before him for consideration the question as to whether or not the receiver was entitled to participate in the unsecured creditors' fund, but when this identical question was presented to him he held that the receiver had not made any attack upon the validity of the mortgage and that the receiver had filed no pleading in the action which would not warrant the court in granting relief of such character to the receiver.

Upon page 307, 309 of the transcript the trial judge disposes of this question as follows:

> "The judgment is entirely the fruit of their diligence, in the exercise of which they took nothing from the petitioner. The petitioner had the same right as they to come into the suit, of the pendency of which it undoubtedly had knowledge. If it did not join hands with the plaintiff to defeat the interveners, still, having

knowledge of the pendency of the foreclosure suit, and presumably being advised of its legal rights, it chose to remain silent and inactive, thus avoiding the expense and peril of litigation, until after these interveners have succeeded, and then when they are about to receive the fruits of their diligence, it seeks to step in and seize the same. It intimates no reason why, though having knowledge that the plaintiff trustee was seeking to appropriate the entire assets of its debtor to the payment of the bonds, it never lifted a finger in resistance, or suggested that the receiver do so. The record does not disclose what the real value of the property is upon which the interveners were awarded a first lien; it may have been very much in excess of the aggregate of their claims. They entered into a stipulation with the plaintiff, agreeing upon a value which was sufficient, but only sufficient, to take care of their claims in full. Had it been known that other creditors would seek to share in such lien it is possible that a much greater value could have been established, but so far as appears the petitioner gave no notice of its intention to assert the present claim until after such stipulation had been entered into. *It is further suggested that the receiver might have asserted for all creditors the rights which the court recognized in the interveners. It is extremely doubtful, to say the least, whether the receiver could have secured a footing to assert*

such rights, even upon behalf of the interveners, whose claims had been allowed in the general creditors' suit. But while the petitioner's claim had been presented, it had never been passed upon or allowed, and it may be questioned therefore whether it fell within the principle of law upon which the recognition of the interveners' liens in the foreclosure suit was predicated. The trustee earnestly contended that before anyone could attack the validity of the chattel mortgage upon the ground relied upon by the interveners they must show some interest in or lien upon the property; and such undoubtedly is the general rule. *How could the receiver have shown such interest in or lien upon the property in behalf of the petitioner? However that may be, upon an examination of the receiver's answer and of the proofs it will be seen that they were not sufficient to justify the court in finding or declaring any lien in favor the petitioner or any other creditors.* Proofs of the existence and status of claims were offered only by the interveners and only touching their claims. The court had no basis upon which to declare a lien in favor of the petitioner." (Italics ours.)

Respectfully submitted,

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